

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1016

IN THE
United States Court of Appeals

FOR THE SECOND CIRCUIT

THE UNITED STATES,
Plaintiff-Appellee,

VS.

CAROL PRYCE, a/k/a JUNIOR PRICE,
Defendant-Appellant.

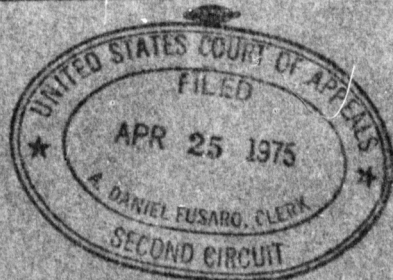
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

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vs.

CAROL PRYCE, a/k/a JUNIOR PRICE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE

I. Statement of Facts

A. Facts Related to the Indictment

On September 14, 1973 Keith Grizzle, a citizen of Jamaica, flew from Jamaica to Toronto, Ontario where he stayed in an apartment on O'Connor Drive (R. 65). He was met by Monica Pryce and requested her assistance in entering the United States (R. 66, 189). Monica Pryce was a permanent resident alien living in Rochester, New York who had participated in a marriage ceremony with

the defendant on May 20, 1971 while in Jamaica. Thereafter in Rochester, New York the defendant visited Monica at her apartment and obtained his aid in securing Grizzle's entry into the country (R. 191). In a series of conversations the defendant informed Monica Pryce that he had found someone who could help Grizzle enter the country, that it would cost \$300, that the money need not be paid all at once. He also requested Grizzle's description and address in Toronto (R. 192, 193). Monica informed Grizzle that the defendant had found someone to assist him and that he would be entering the country on October 1, 1973 (R. 193, 194).

On the morning of October 1, 1973 the defendant borrowed Stephen Madison's identification papers and Leroy Wheeler's automobile; he had previously obtained Manning McCutcheon's identification papers (R. 276, 282, 271). In addition he arranged for a fellow employee to punch his time card at Xerox to reflect a full day's work (Exhibit 13, R. 308).

On October 1, 1973 the defendant drove to Toronto and the apartment in which Grizzle was visiting, gave Manning McCutcheon's identification papers to Grizzle and instructed Grizzle to represent himself to be McCutcheon when entering the United States (R. 69-72). The defendant drove Grizzle to a subway station where he left Grizzle to enter the United States by automobile with Leroy Cephas and flew back to the United States (R. 78, 286, 420 and Exhibit 7). After his return to the United States he telephoned and visited Monica Pryce to determine whether or not Grizzle and the others in the car had arrived in Rochester (R. 203). In the meantime Grizzle had reached the border, had represented himself to be Manning McCutcheon but was apprehended by immigration officers (R. 86, 91).

B. Facts Relating to the Admissibility of Monica Pryce's Testimony

Monica Pryce, the ceremonial wife of the defendant, was called as a witness on behalf of the Government (R. 127). Initially, the defendant failed to object to her testimony. When Monica Pryce was asked to relate a conversation she had with the defendant, however, the defendant objected to her testimony on the basis that the conversations were confidential communications between husband and wife (R. 133, 134, 135). The Court held a hearing with respect to the facts relating to the marriage prior to resolving the issue of whether or not the privilege could be invoked (R. 153).

The evidence at the hearing showed that Monica Pryce was the mother of two children by Barrington Pryce, the defendant's brother (R. 155). While Barrington was on vacation in Jamaica she asked him for assistance in coming to America (R. 156). Barrington wrote Monica and told her that she could marry the defendant, his brother, when the defendant was in Jamaica on vacation in April of 1971 (R. 156). The defendant vacationed in Jamaica during May 1971 and agreed to marry Monica Pryce provided she sponsor the entry of the defendant's two children into the United States (R. 157). On May 20, 1971 the defendant married Monica Pryce and thereafter returned her to her parents' house (R. 159). On May 21, 1971 Monica Pryce applied for a visa to enter the United States (R. 161). In June 1973 Monica Pryce entered the United States and was informed by Barrington Pryce that the defendant was going to charge her \$400 because she did not bring his children into the United States (R. 161, 160). After Keith Grizzle was arrested the defendant informed Monica Pryce that instead of paying \$400 for entering the United

States she should use the money to divorce him (R. 153). Monica thereafter filed for divorce (R. 165). At no time either prior to or subsequent to the marriage did Monica and the defendant ever live together or consummate the marital relationship (R. 162, 163, 164). At the time of the marriage and continuing thereafter Monica was living with Keith Grizzle, had borne him one child and was pregnant with another child by him at the time of trial (R. 157, 128, 129).¹

Following the hearing and argument by counsel the Court found that Monica Pryce and the defendant never intended to live as husband and wife and that the reasons for the husband and wife privilege were not present in this marriage. The Court ruled that Monica Pryce could testify about conversations she had with the defendant (R. 185, 186).

¹ In later testimony to the Court, after its ruling and outside the presence of the jury, Monica Pryce stated that the defendant instructed her to advise the Immigration Service that she lived with the defendant so that the Immigration Service would not know she married him for the purpose of entering the United States (R. 253, 254).

II. ARGUMENT

A. The District Court correctly permitted Monica Pryce to testify against the defendant.

Rule 26 of the Federal Rules of Criminal Procedure and Rule 501 of the Proposed Federal Rules of Evidence provide that in the absence of statutory provision the privilege of a witness shall be governed "by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience." The proposed Federal Rule of Evidence represents a deliberate decision by Congress to allow the rules defining privilege to be developed by the courts without statutory codification. See House Judiciary Report 93-650, Senate Judiciary Committee Report 93-1277, Conference Committee Report 93-1597 all contained in Volume 12-A (Pamphlet) 1974 *United States Code Congressional and Administrative News* 65, 41 and 88. See also Rothstein, "The Proposed Amendments to the Federal Rules of Evidence", 62 *Georgetown Law Journal* 125 (Oct., 1973).

Under the common law the general rule in criminal cases is that one spouse may prevent the other spouse from testifying against him in a criminal action, however, if they are no longer married or were not married when the events charged in the indictment occurred, the defendant may only prevent the witness spouse from testifying about confidential communications which occurred within the marriage *Hawkins v. United States*, 358 U.S. 74 (1968); *Wolfe v. United States*, 291 U.S. 7 (1934); *United States v. Mackiewicz*, 401 F.2d 219 (2d Cir., 1968) cert. denied 393 U.S. 923 (1968); *Wigmore on Evidence* (McNaughton rev. 1961) Chapter 79. Exceptions to the privilege are recognized where the marriage was a sham and both spouses

have participated in the criminal activity *Lutwak v. United States*, 344 U.S. 604 (1955); *United States v. Kahn*, 471 F.2d 191 (7th Cir., 1972); reversed on other grounds 415 U.S. 143 (1974); *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir., 1975). Even under the originally proposed Federal Rules of Evidence the marital privilege did not apply where the marriage was a sham 56 FRD 244 at 246.

When the Government first called Monica Pryce to the stand the defendant failed to object to her testimony thus waiving his right to claim the privilege for all purposes *Olender v. United States*, 210 F.2d 795 (9th Cir., 1972); *United States v. Figueroa-Paz*, 468 F.2d 1055 (9th Cir., 1972); 8 *Wigmore (supra)* Section 2242 at 257. Nevertheless, the Court entertained the defendant's objections to the questions posed to Monica Pryce relating to the substance of her conversations with the defendant and properly conducted a hearing to determine whether or not the privilege was applicable *United States v. Redstone*, 488 F.2d 300 (8th Cir., 1973).

The Court determined that the marital relationship between Monica Pryce and the defendant was a sham. They never intended to reside as husband and wife. Their purpose in marrying was to obtain the entry of Monica Pryce and the defendant's children into the United States. Prior to the marriage ceremony, at the time it occurred and after the ceremony Monica lived with Keith Grizzle as his common law wife. At the time of trial a divorce had been instituted at the request of the defendant.

In *Lutwak* the Court stated:

When the good faith of the marital relation is pertinent and it is made to appear to the trial court, as it was here, that the relationship was entered into with no intention of the parties to live together as husband and

wife but only for the purpose of using the marriage ceremony in a scheme to defraud, the ostensible spouses are competent to testify against each other. Here again, we are not concerned with the validity or invalidity of these so-called marriages. We are concerned only with the application of a common-law principle of evidence to the circumstances of this case. In interpreting the common law in this instance, we are to determine whether "in the light of reason and experience" we should interpret the common law so as to make these ostensible wives competent to testify against their ostensible husbands. The reason for the rule at common law disqualifying the wife is to protect the sanctity and tranquility of the marital relationship. It is hollow mockery for the petitioners in arguing for the policy of the rule to invoke the reason for the rule and to say to us "the husband and wife have grown closer together as an emotional, social, and cultural unit" and to speak of "the close emotional ties between husband and wife" and of "the special protection society affords to the marriage relationship." In a sham, phony, empty ceremony such as the parties went through in this case, the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule. *Lutwak* at 614, 615.

The issue in determining the application of the privilege is not the crime charged in the indictment but the nature of the interest being protected. Where, as here, there never was a marital relationship of any kind there is no reason for invoking the protection afforded under the rule and it follows that any communication made by the defendant to Monica Pryce has no special status by virtue of a hollow ceremony. *Pereira v. United States*, 202 F.2d 830 (5th Cir., 1953), affirmed 347 U.S. 1 (1954); *United States v. Ryno*, 130 F.Supp. 685 (S.D.Cal. 1956), affirmed 232 F.2d 581 (9th Cir., 1956); *United States v. Rubenstein*, 151 F.2d 915 (2nd Cir., 1945); cert. denied 326 U.S. 766 (1945); *United States v. Mackiewicz*, 401 F.2d 219 (2nd Cir., 1972); *Wigmore, supra*, § 2239; but see *United States*

v. Walker, 176 F.2d 564 (2nd Cir., 1949); see also *United States v. Woodall*, 438 F.2d 1317 at 1324 (5th Cir., 1970), cert. denied 403 U.S. 933 (1971).

Wigmore asserts that the factual basis for one reason supporting the privilege is the natural repugnance to compel one spouse to condemn the other. Wigmore, *supra* § 2228 at 217. In this situation there would be more repugnance to allow Monica to testify against Keith Grizzle, yet such testimony would be admissible in *Walker*, *supra*. The defendant's attempt to use Monica to obtain the entry of his children into this country and his attempt to charge her for participation in the marriage ceremony with him stifles any feeling of repugnance before it can arise.

The conversation between Monica and the defendant concerned the arrangements for securing her common law husband's entry into the United States. They were communications in Grizzle's behalf and in order for him to obtain the benefit of these arrangements they necessarily would be disclosed to him. There was no expectation that they would remain only between the defendant and Monica Pryce. Thus the conversations would not be excludable as privileged communications between spouses, were that rule applicable *United States v. Pereira*, 347 U.S. 1 at 6 (1954); *Grulky v. United States*, 394 F.2d 244 (8th Cir., 1968).

Monica Pryce and the defendant conspired with each other to commit a crime against the United States by obtaining Keith Grizzle's illegal entry into the country. The Seventh Circuit in a similar circumstance has stated:

In *Kahn* we concluded that the public interest in preserving the family was not great enough to justify protecting conversations in furtherance of crimes joined in by both spouses; similarly here, we think

that goal does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness.

United States v. VanDrunen, 501 F.2d 1393 at 1396 (7th Cir., 1974). See also *United States v. Kahn*, 471 F.2d 191 (7th Cir., 1972) reversed on other grounds 415 U.S. 143 (1974) and 8 Wigmore, *supra*, § 2228 at 216. While the Court was careful to distinguish *Hawkins*, it decided that the interest of preserving the family should give way to the greater interest in determining the truth.

B. The evidence was sufficient to sustain the jury's guilty verdict on Counts I and III of the indictment.

Even without the testimony of Monica Pryce the evidence is that Keith Grizzle, an alien, desired to enter the United States and communicated this desire to Monica Pryce; that the defendant obtained identification papers of American citizens, borrowed an automobile, drove up to Toronto with Leroy Cephas, gave Keith Grizzle the identification papers of an American citizen and instructed him as to the proper responses to questions of the Immigration inspectors; and that Keith Grizzle followed the defendant's instructions. The testimony of Monica Pryce adds only the facts that the defendant agreed to assist her in obtaining Grizzle's entry, intended to charge \$300 for his aid, knew when Keith Grizzle was to be brought into the United States and on the night of October 1, 1973 actually expected Grizzle and the others to be in the United States. Thus the jury could and did properly determine that the defendant conspired with Keith Grizzle and Monica Pryce, among others, to bring Grizzle into the United States and did bring him into the country as charged in the indictment.

III. Conclusion

The District Court correctly permitted Monica Pryce to testify against the defendant.

The evidence in the case sustains the jury's verdict of guilty on Counts I and III of the indictment.

Respectfully submitted,

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State of New York) RE: U. S. A.
County of Genesee) ss.: v
City of Batavia) Carol Pryce
Docket No. 75-1016

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A. A. GERALD KLEPS
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